

**STATE OF MICHIGAN  
IN THE SUPREME COURT**

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**THE PEOPLE OF THE STATE OF MICHIGAN,  
Plaintiff-Appellant,**

**-vs-**

**Supreme Court No. \_\_\_\_\_**

**TREMEL ANDERSON,  
Defendant-Appellee.**

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**36<sup>TH</sup> District Court No. 15-055296  
Wayne County Circuit Court No. 15-001051  
Michigan Court of Appeals No. 327905**

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**PLAINTIFF-APPELLANT'S  
APPLICATION FOR LEAVE TO APPEAL**

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**STATEMENT OF JURISDICTION**

This Court has jurisdiction to grant the People's application for leave to appeal by virtue of MCR 7.303(B)(1).

**JUDGEMENT APPEALED FROM**

The Court of Appeals' unpublished November 29, 2016, decision is clearly erroneous because it misapplied the probable cause standard for preliminary examinations.<sup>1</sup> This application is timely filed because it is being filed within 56 days after the Court of Appeals opinion.<sup>2</sup>

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<sup>1</sup> See Appendix A.

<sup>2</sup> MCR 7.305(C)(2)(a); the Court of Appeals decision was issued on November 29, 2016 (attached as Appendix A).

**STATEMENT OF QUESTION PRESENTED**

- I. In considering the function of the district court at a preliminary examination, this Court has said both that the lower court should, and that it should not, decide the bindover motion based on witness credibility. The correct view is that the district court should only consider credibility when a witness's testimony either contradicts indisputable facts, or is so patently incredible or inherently implausible that it could not be believed by a reasonable juror. Therefore, should this Court grant leave in order to adopt a standard similar to the *Lemmon* standard but for preliminary examinations?

The People answer: "Yes."

The Defendant answers: "No."

The lower court did not answer this question.

## INTRODUCTION

The Court itself has recognized that there is a conflict between the holdings in *People v Doss* and *People v King*, but has yet to resolve this conflict. *People v Doss* held that the object of a preliminary examination is not to prove guilt or innocence beyond a reasonable doubt and where evidence conflicts or raises a reasonable doubt as to the defendant's guilt, such questions should be left for the jury to decide.<sup>3</sup> In contrast, *People v King* held that it is the magistrate's duty to pass on the credibility of witnesses and on the weight and competency of evidence.<sup>4</sup> Indeed, *People v Yost*, recognized the tension between the idea that a magistrate can assess the credibility of witnesses and the principle that a magistrate should not refuse to bindover a defendant merely because the evidence conflicts or raises a reasonable doubt as to the defendant's guilt.<sup>5</sup> The *Yost* court did not resolve this question, however, and courts have continued to struggle to properly apply these two divergent principles. Therefore, in order to aid courts in the future, the proper resolution is that the examining court should apply a standard akin to the *Lemmon* standard when evaluating testimony following a preliminary examination.<sup>6</sup> That is, a district court should only fail to bindover a defendant when no reasonable juror could believe the facts presented.

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<sup>3</sup> *People v Doss*, 406 Mich 90 (1979).

<sup>4</sup> *People v King*, 412 Mich 145 (1981).

<sup>5</sup> *People v Yost*, 468 Mich 122 (2003).

<sup>6</sup> "[U]nless it can be said that directly contradictory testimony was so far impeached that it was deprived of all probative value or that the jury could not believe it, or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *People v Lemmon*, 456 Mich 625, 645-646 (1998). Of course the portion of the *Lemmon* opinion that holds that a new trial is granted if the case is marked by uncertainties and discrepancies would be inapplicable to the preliminary examination scenario.



### **STATEMENT OF FACTS**

The Defendant was charged with assault with intent to murder,<sup>7</sup> carrying a concealed weapon,<sup>8</sup> felonious assault,<sup>9</sup> and felony firearm.<sup>10</sup> On December 24, 2014, at around 11:30 p.m., the Defendant was driving the victim, Michael Larkins, to his home via the Lodge Freeway.<sup>11</sup> The victim and the Defendant had dated and had a one-month-old child together.<sup>12</sup> The Defendant became angry with the victim and started yelling at him.<sup>13</sup> The Defendant pulled a black handgun from between her thighs and pointed it at the victim.<sup>14</sup> The Defendant threatened to kill him and said no one would believe him if he reported her.<sup>15</sup> The Defendant drove in this manner for about five minutes before pulling off the freeway and stopping the vehicle.<sup>16</sup> Once she stopped the vehicle she pointed the gun and tried to shoot the victim but the gun did not discharge.<sup>17</sup> The victim scrambled out of the car and started to run across Puritan Street and as he did he heard the gun fire three times behind him.<sup>18</sup> He was not hit by any of the bullets.<sup>19</sup>

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<sup>7</sup> MCL 750.83.

<sup>8</sup> MCL 750.227.

<sup>9</sup> MCL 750.82.

<sup>10</sup> MCL 750.227b.

<sup>11</sup> PE, 18.

<sup>12</sup> PE, 5, 8.

<sup>13</sup> PE, 7.

<sup>14</sup> PE, 9-10, 12.

<sup>15</sup> PE, 8.

<sup>16</sup> PE, 13.

<sup>17</sup> PE, 14.

<sup>18</sup> PE, 27.

<sup>19</sup> PE, 15.

The Defendant called the police and the victim screamed for help so the Defendant hung up the phone.<sup>20</sup> The Defendant threw the victim's clothes and coffee mug into the street and then drove away.<sup>21</sup> The victim used a neighbor's telephone to call the police.<sup>22</sup>

The district court dismissed the case at the conclusion of the preliminary examination. The district court explained:

THE COURT: ...well, let me tell you what my issue are so we can go straight to the point, huge issues with credibility. This young man wants me to believe that somebody had a gun on him; they pulled the car over; he asked to get out; but he wanted his Christmas gifts.

He is afraid because this person threatened to kill him and they're pointing a gun at him but he wants to get his Christmas gifts for his family. I don't any testimony about a handgun. If I don't believe this witness, if I find him to not be credible, which in a preliminary examination, I have to determine the credibility of the witness.

You've put on no witness to tell me that there was a handgun recovered. You've put on no witness to tell me that there was some spent casings, shell casings were recovered.

There's no witness, other than this young man, who is just all over the place everywhere and although he's claimed that this gun was pulled out, I'm just going to tell you, I am having a hard time believing that his life was at stake and we have no tape of the 911 call that supports that he felt that he was in danger.

We have nothing else but his testimony that is, quite frankly, that is just incredible. He is not a credible witness.<sup>23</sup>

That same day, the district court entered a written order dismissing the case for "insufficient evidence." The People appealed this ruling to the Third Circuit Court. On May 29, 2015, Wayne County Circuit Court Judge Glendenning, without granting oral argument, denied

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<sup>20</sup> PE, 26.

<sup>21</sup> PE, 28.

<sup>22</sup> PE, 28.

<sup>23</sup> PE, 29-30.

the People's appeal. The People filed an application for leave to appeal to the Court of Appeals. The People's application for leave to appeal was granted on December 22, 2015. The Court of Appeals, in a split decision, affirmed the district court in an unpublished decision dated November 29, 2016. This application for leave to appeal ensues.

## ARGUMENT

- I. In considering the function of the district court at a preliminary examination, this Court has said both that the lower court should, and that it should not, decide the bindover motion based on witness credibility. The correct view is that the district court should only consider credibility when a witness's testimony either contradicts indisputable facts, or is so patently incredible or inherently implausible that it could not be believed by a reasonable juror. Therefore, this Court should grant leave in order to adopt a standard similar to the *Lemmon* standard but for preliminary examinations.**

### Standard of Review

An appellate court reviews the district court's decision whether to bind a defendant over to circuit court for an abuse of discretion.<sup>24</sup> “[A] court ‘by definition abuses its discretion when it makes an error of law.’”<sup>25</sup> An appellate court will also find an abuse of discretion where an unprejudiced person, considering the facts on which the court acted, would say there was no justification or excuse for the ruling,<sup>26</sup> or, stated otherwise, if the decision results in an outcome falling outside the principled range of outcomes.<sup>27</sup> A district court's factual determinations are reviewed for clear error.<sup>28</sup>

### Discussion

The district court abused its discretion in failing to bind over the Defendant to circuit court as charged where the un-contradicted evidence showed that the Defendant pointed the gun at the victim and tried to shoot him. The court erred as a matter of law in concluding that the

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<sup>24</sup> *People v Yost*, 468 Mich 122, 126 (2003); *People v Hudson*, 241 Mich App 268, 276 (2000).

<sup>25</sup> *People v Giovannini*, 271 Mich App 409, 417 (2006), quoting *Koon v United States*, 518 US 81 (1996).

<sup>26</sup> *People v Carlin (On Remand)*, 239 Mich App 49 (1999).

<sup>27</sup> *People v Babcock*, 469 Mich 247, 269 (2003).

<sup>28</sup> MCR 2.613(C).

Defendant's criminal acts were somehow excused because no shell casings were found at the scene. The elements of the crimes were met by the victim's testimony. The elements of assault with intent to murder are:

(1) The defendant is charged with the crime of assault with intent to murder. To prove this charge, the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant tried to physically injure another person.

(3) Second, that when the defendant committed the assault, [he/she] had the ability to cause an injury, or at least believed that [he/she] had the ability.

(4) Third, that the defendant intended to kill the person [he/she] assaulted [, and the circumstances did not legally excuse or reduce the crime].<sup>29</sup>

In order to prove carrying a concealed weapon the prosecution must show that the defendant carried a dangerous weapon (a handgun) in a vehicle operated by the defendant.<sup>30</sup> In order to prove the crime of felonious assault the prosecution must show that the defendant made an assault on the victim with a dangerous weapon.<sup>31</sup> And in order to prove felony firearm the prosecution would have to prove that the defendant possessed a handgun while he or she committed a felony.<sup>32</sup> Each of these crimes was proven under the probable cause standard by the victim's testimony that while the Defendant was driving with the victim in the passenger seat, the Defendant pointed a gun at the victim and tried to shoot him. Therefore, the case should have been bound over for trial.

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<sup>29</sup> CJI2d 17.3.

<sup>30</sup> MCL 750.227.

<sup>31</sup> MCL 750.82.

<sup>32</sup> MCL 780.227b.

**A. There is no constitutional right to a preliminary examination; it is a statutory creation.**

Since a preliminary examination hearing did not exist under the common law, there is no constitutional right to a preliminary examination. The right of an accused to a preliminary examination, then, is dependent on its creation by either statute or a constitutional provision.<sup>33</sup>

In Michigan, the right to a preliminary examination is created by statute. MCL 766.1 gives the state and an accused a right to a prompt examination:

The state and accused shall be entitled to a prompt examination and determination by the examining magistrate in all criminal causes and it is hereby made the duty of all courts and public officers having duties to perform in connection with such examination, to bring them to a final determination without delay except as it may be necessary to secure to the accused a fair and impartial examination.<sup>34</sup>

MCL 766.13 addresses the discharge of defendant and binding over for trial.

§13. If it shall appear to the magistrate at the conclusion of the preliminary examination either that an offense has not been committed or that there is not probable cause<sup>35</sup> for charging the defendant therewith, he shall discharge such defendant. If it shall appear to the magistrate at the conclusion of the preliminary examination that a felony has been committed and there is probable cause for charging the defendant therewith, the magistrate shall forthwith bind the defendant to appear before the circuit court of such county, or other court having jurisdiction of the cause, for trial.

**B. The purpose of the preliminary examination is not to resolve factual issues but to weed out groundless and unsupported charges.**

The purpose of the preliminary examination is to determine whether there is

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<sup>33</sup> 21 Am Jur 2d, Criminal Law, §442; *Gerstein v Pugh et al.*, 420 US 103 (1975), holding that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended detention following arrest.

<sup>34</sup> MCL 766.4 requires a date be set for the preliminary examination not exceed fourteen days after the arraignment.

<sup>35</sup> "Probable Cause" is used herein in the sense of determining whether there is a reasonable basis to believe that an offense has been committed and that the defendant committed it. 21 Am Jur 2d, Criminal Law, §443.

probable cause to believe a crime has been committed and probable cause to believe that the defendant committed it, for the purpose of, as our Supreme Court put it, “weed[ing] out groundless or unsupported charges of grave offenses....,” and also to protect the accused from a hasty, improvident, or malicious prosecution.<sup>36</sup> Probable cause does not require proof beyond a reasonable doubt– the examining magistrate is to bind a defendant over for trial if it appears from the evidence, and all reasonable inferences drawn from that evidence, that there is probable cause to believe a crime has been committed and there is probable cause to believe the defendant committed it.<sup>37</sup>

It is *not* the function of the examining magistrate to weigh the evidence carefully and discharge the accused when the evidence conflicts or raises reasonable doubt as to guilt, as these questions are solely for the trier of fact.<sup>38</sup> In order to determine a standard for when a magistrate may legitimately determine that charges are groundless or unsupported, and when there exists a duty to find probable cause to believe both that the offense occurred and that the defendant committed it so as to demand that the ultimate question of guilt or innocence be determined by a trier of fact at trial on the merits, the cases of *People v Doss*<sup>39</sup> and *People v King*<sup>40</sup> must be closely examined and, if possible, harmonized.

In *People v Doss*, a Detroit Police Officer was charged with manslaughter, and after bindover, a motion to quash alleging an abuse of discretion on the part of the magistrate was

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<sup>36</sup> *People v Duncan*, 338 Mich 489, 501 (1972).

<sup>37</sup> *People v Asta*, 337 Mich 590, 609 (1953); *People v Goecke*, 457 Mich 442, 469 (1998).

<sup>38</sup> *Matter of Buckner*, 92 Mich App 119 at 122-123 (1979).

<sup>39</sup> *People v Doss*, 406 Mich 90 (1979).

<sup>40</sup> *People v King*, 412 Mich 145 (1981).

denied. The Michigan Court of Appeals reversed, finding an abuse of discretion on the ground that under the facts presented at the preliminary examination self-defense was not negated. The Michigan Supreme Court disagreed, reversing the Court of Appeals and upholding the magistrate.<sup>41</sup> The Supreme Court made the following pertinent observations:

The object of a preliminary examination is not to prove guilt or innocence beyond a reasonable doubt, nor should a magistrate discharge a defendant when evidence conflicts or raises reasonable doubt of his guilt; such questions should be left for the jury upon the trial.<sup>42</sup>

The *Doss* Court also quoted from *People v Oster*,<sup>43</sup> that in order to bind a defendant over "positive proof of guilt is not required... there must be evidence on each element of the crime charged or evidence from which those elements may be inferred."<sup>44</sup> The court concluded that the question of whether the force used by the defendant under the circumstances was excessive was "properly left for the jury."<sup>45</sup>

In *People v King*, (a 4-3 per curium opinion issued without briefing and argument, in lieu of granting leave to appeal) the defendant was charged with first degree murder.<sup>46</sup> The deceased was living with the defendant's wife and children while a divorce was in progress. The defendant telephoned the deceased (after having consumed a considerable quantity of intoxicants) and made threatening remarks, to which deceased responded with taunting remarks.<sup>47</sup> Defendant went to the residence armed with a pistol, and the deceased attempted to

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<sup>41</sup> *People v Doss*, 406 Mich 90, 103 (1979).

<sup>42</sup> *People v Doss, supra*, 406 Mich at 103 (emphasis added).

<sup>43</sup> *People v Oster*, 67 Mich App 490 (1976).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*, 406 Mich at 103.

<sup>46</sup> *People v King*, 412 Mich 145 (1981).

<sup>47</sup> *Id.*, 412 Mich at 148.



block his entry into the house by leaning against the door.<sup>48</sup> The defendant shot through the door, killing the deceased. Testimony as to defendant's drunken condition was offered. Defendant was bound over only on manslaughter. The People appealed, and the circuit court affirmed; however, the Court of Appeals reversed, finding an abuse of discretion on the part of the magistrate, *in that in the court's view the magistrate's inquiry should have stopped at the point at which some evidence on each element of the offense charged was presented.*

The Michigan Supreme Court, in turn, reversed the Court of Appeals, and upheld the magistrate's decisions finding that the Court of Appeals had too narrowly viewed the function of the magistrate at a preliminary examination, holding that it is the magistrate's duty to pass judgment on the weight and competency of the evidence, and also the credibility of the witnesses, and that the magistrate may consider evidence in defense. The magistrate, said the court, is not limited to whether evidence has been presented on each element of the offense, but must make his decision based on an "examination of the whole matter."<sup>49</sup> The court found in the case before it that under the circumstances there was an insufficient showing of malice and premeditation for murder. The court, however, also stated that the magistrate should not discharge (or reduce the charge) when "evidence *conflicts* or raises reasonable doubt of the defendant's guilt, since that *presents the classic issue for the trier of fact.*"<sup>50</sup>

On the surface, it might appear that *People v Doss* and *People v King* are inconsistent, but *People v King* cites *People v Doss* with approval. It is necessary, then, to reconcile the statement in *People v Doss* that to establish the offense "there must be evidence on each element of the

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<sup>48</sup> *Id.*, at 149.

<sup>49</sup> *Id.*

<sup>50</sup> *People v King*, 412 Mich 145 (emphasis added).

crime charged or evidence from which those elements may be inferred," with that in *People v King*, that "the inquiry is not limited to whether the prosecution has presented some evidence on each element," but an examination of the "entire matter" is allowed, though a magistrate may *not* reduce or discharge simply because the evidence "conflicts or raises a reasonable doubt of the defendant's guilt, since that presents the classic issue for the trier of fact."<sup>51</sup>

A standard must be discerned from these statements which permits the magistrate to refuse to bind over even though there is some evidence on each element, or evidence from which the elements may be inferred, but which prohibits the magistrate from refusing to bind over simply because the evidence conflicts or raises a possible reasonable doubt; in short, where it creates issues classically *resolved at trial*. From prior case law (e.g. *People v Duncan*)<sup>52</sup> and from *People v Doss* and *People v King*, the following rules may be deduced:

- 1) The purpose of examinations is to weed out groundless and unsupported charges.
- 2) In so doing, the magistrate may not determine the case as a factfinder at trial, and may not fail to bind over as charged simply because the evidence conflicts or a possible reasonable doubt exists; in short, when there are *triable issues of fact*.
- 3) In examining the whole matter, considering the weight of the evidence and its credibility, and considering evidence in defense (and/or mitigation) which is supplementary to, and not in conflict with, any prosecution evidence (such conflicts simply creating triable issues), the magistrate may reduce or discharge, even where there is some evidence on every element, only where in reviewing that evidence as a whole, *no reasonable person could find probable cause as to the demonstration of an element*.

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<sup>51</sup> *Id.*, 412 Mich at 154. Emphasis added.

<sup>52</sup> *People v Duncan*, 388 Mich 489 (1972), overruled on other grounds, *People v Glass*, 464 Mich 266 (2001).

**C. The deference shown to the facts when ruling on a motion for a directed verdict is the same that should be shown at a motion for bindover.**

By way of comparison, if a motion for directed verdict is made at trial, it can be presumed that the People have presented all of the legally admissible evidence available at the close of their proofs and at the time a motion for directed verdict might be made. The test on a defendant's motion for directed verdict is whether, viewing the evidence and all reasonable inferences gleaned from the evidence in the light most favorable to the prosecution, the evidence would allow a reasonable person to find guilt proven beyond a reasonable doubt.<sup>53</sup> Both the standard and the evidence are greater at trial when a motion for directed verdict is made than at the conclusion of a preliminary examination when a motion to bind over is made. In ruling on a motion for directed verdict the trial court must be mindful that it is for the jury to decide who to believe and what testimony of a particular witness to believe.<sup>54</sup> The reviewing court must examine the record in the light most favorable to the government, and it is not the reviewing court's prerogative to retry the case, weigh the evidence, or assess the credibility of witnesses.<sup>55</sup>

Adoption and application of the directed verdict standard for use at the preliminary examination (geared to probable cause) is logically sound. There should be the same, if not more, deference given at the preliminary examination to the credibility-weighting function of the ultimate fact-finder than is given by a judge at trial on a motion for directed verdict after the People conclude their presentation of their proofs. At trial, a judge ruling on a directed-verdict

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<sup>53</sup> *People v Hampton*, 407 Mich 354 (1979); *Jackson v Virginia*, 443 US 307 (1979).

<sup>54</sup> *People v Bowyer*, 108 Mich App 517 (1981); *US v Carter*, 720 F 2d 941 (7<sup>th</sup> Cir. 1983).

<sup>55</sup> *People v Herbert*, 444 Mich 466 (1993).

motion is *not* completely free to resolve credibility issues and conflicts in evidence, but has only an extremely limited role.

When ruling on a motion for directed verdict, the trial judge must view the evidence and all reasonable inferences in the light most favorable to the prosecution to determine whether a reasonable person could find guilt beyond a reasonable doubt.<sup>56</sup> Where a reasonable person *could* credit testimony showing guilt, or resolve a conflict in evidence in favor of guilt, the judge is required to let the case go to the jury. It is only, then, where no rational person could credit the testimony, that a judge has a “credibility-determining” role in ruling on a motion for directed verdict.

To give to the examining magistrate a credibility-determining role that is greater than that of the trial judge when ruling on a motion for directed verdict – where the function of a preliminary examination is to weed out groundless and unsupported charges – is simply illogical. The result would be cases being dismissed at the preliminary examination which could *not* be dismissed on a motion for directed verdict, an absurd result.

**D. The examining magistrate must leave questions of fact for the jury and draw reasonable inferences favorable to the prosecution.**

In *People v Yost*, one of the questions that this Court asked the parties to address was “what is the appropriate role of the magistrate at a preliminary examination in assessing the credibility of witnesses and how does that assessment affect the bindover decision.”<sup>57</sup>

Ultimately, although the court acknowledged that there was tension between the authority of a magistrate to consider the credibility of witnesses and the principle that a magistrate should not

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<sup>56</sup> *People v Hampton*, 407 Mich 354 (1979).

<sup>57</sup> *People v Yost*, 468 Mich 122, 125 (2003).

refuse to bindover a defendant when the evidence merely conflicts or raises a reasonable doubt as to the defendant's guilt, the Court found no need to clarify the interplay between those principles in its opinion.<sup>58</sup> In the instant case, however, there is a need to clarify the interplay between those principles, especially since the testimony of the victim was not met with any conflicting evidence at the preliminary examination.<sup>59</sup>

In order to determine a standard for when a magistrate may legitimately determine that charges are groundless or unsupported, and when there exists a duty to find probable cause to believe both that the offense occurred and that the defendant committed it so as to demand that the ultimate question of guilt or innocence be determined by the trier of fact, credibility should only be considered to the extent that the evidence presented by the prosecution is, as a matter of law, incredible. Therefore, the magistrate should and must leave questions of fact for the jury, and the magistrate should draw inferences favorable to the prosecution. Doubts about the credibility of a witness do not and should not permit a magistrate to discharge the accused as long as the doubts expressed by the magistrate do not obviate a rational conclusion that there is probable cause to believe that the defendant committed the crime with which he or she is charged. Reconciliation of the case law mandates that the directed verdict standard (or a similar standard) be adopted and applied when weighing the credibility of a witness at the preliminary examination.

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<sup>58</sup> *People v Yost*, 468 Mich 122, fn 8 (2003).

<sup>59</sup> The magistrate based her decision solely on her negative credibility evaluation of the victim's testimony which was based on the victim's "negotiating" with the Defendant over Christmas gifts. PE, 29-31.

Indeed, the most common probable cause standard enunciated in other states that have probable cause hearings is the directed verdict standard.<sup>60</sup> That standard would certainly resolve the tension between the two current principles involved in preliminary examinations and cause greater uniformity in results. It would also avoid harsh results that deny a victim a chance at justice in our criminal justice system and that displace the jury as the proper body to make the ultimate decision as to innocence or guilt.<sup>61</sup>

### **Conclusion**

The record shows that the trial court abused its discretion in refusing to bind the Defendant over to circuit court on the charges of assault with intent to murder, felonious assault, carrying a concealed weapon, and felony firearm, and the Circuit Court and the Court of Appeals erred by not reversing this decision. The examining magistrate's credibility determination is not unreviewable, as is suggested by the majority's opinion. An examining magistrate should at least be able to point to some objective facts to support their credibility determination. In this case, the examining magistrate found only that it was strange that the victim was concerned about his Christmas gifts being left in the car. The examining magistrate ignored the fact that

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<sup>60</sup> See, Frank Miller and the Decision to Prosecute, 69 Washington University Law Review 159. See also Graham & Letwin, The Preliminary Hearing in Los Angeles, 18 UCLA Law Review 636, and American Law Institute, A Model Code of Pre-Arrest Procedure (Tent. Draft No. 5 §330.5 (3) (Model Code). See *Myers v Commonwealth*, 363 Mass 843 (1973), holding that in Massachusetts the directed verdict rule is to be applied to preliminary hearings. See also, *People v District Court of Colorado's Seventeenth Judicial District*, 926 P 2d 567, 570 (1996), holding that in Colorado the examining magistrate is obligated to view the evidence in the light most favorable to the prosecution. And also, *Commonwealth v Marti*, 779 A 2d 1177, 1180 (2001), holding that in Pennsylvania, "Inferences reasonably drawn from the evidence of record which would support a verdict of guilty are to be given effect, and the evidence must be read in the light most favorable to the Commonwealth's case."

<sup>61</sup> *People v Tremel Anderson*, dissent, unpublished COA decision, No. 327905, p. 4 (November 29, 2016) [Appendix A].

this concern vanished once the Defendant attempted to pull the trigger and then began to shoot at the victim. At that point, the victim ran away, abandoning the car and the gifts left inside.<sup>62</sup> Therefore, the examining magistrate's stated reason for doubting the victim was not really present. Instead of allowing examining magistrates unfettered discretion to believe or disbelieve testimony based on specious reasons (as in this case), the better result is for the examining court to apply a standard akin to that enunciated in *People v Lemmon*<sup>63</sup>, so that victims will have a chance a justice irrespective of the biases or whims of the examining magistrate.<sup>64</sup> Here, applying the *Lemmon* standard, the victim's testimony definitely did not contradict physical facts, nor was it so patently incredible or so inherently implausible that it could not be believed as a matter of law.<sup>65</sup> The case should have been bound over for trial.

This Court should, therefore, grant the People's application for leave to appeal, clarify the standard of review as it relates to credibility determinations made by examining magistrates, or in the alternative, peremptorily reverse the district court's order dismissing the case for the reasons stated in Judge Saad's dissenting opinion,<sup>66</sup> and remand the case to the circuit court for trial.

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<sup>62</sup> PE, 17; 27.

<sup>63</sup> That is, the examining magistrate should evaluate credibility only to the extent that the testimony was so far impeached that it was deprived of all probative value or that it contradicted indisputable physical facts or defied physical realities. Otherwise, the examining magistrate should leave credibility determinations for the jury. Of course, the portion of the *Lemmon* opinion that grants a new trial to prevent a miscarriage of justice would not apply to preliminary examinations; the case simply would not be bound over in such a case.

<sup>64</sup> *People v Lemmon*, 456 Mich 625 (1998).

<sup>65</sup> *Id.*

<sup>66</sup> *People v Tremel Anderson*, unpublished COA opinion No. 327905, November 29, 2016, attached as Appendix A.

**RELIEF REQUESTED**

WHEREFORE, The People of the State of Michigan respectfully request this Honorable Court grant the People's application for leave to appeal, or in the alternative peremptorily reverse the decision of the district court and remand the case for trial in Circuit Court.

Respectfully submitted,

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**Appendix A**

*People v Tremel Anderson,*  
Unpublished COA Decision, No. 327905,  
Decided November 29, 2016.